IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-6817

MAURICE McELWEE,
Petitioner.

V.

STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Steven M. Mason

Wilson McVicker, Jr.

McVicker, Evans & Mason
113 N. Second Street
P. O. Drawer 1747
Lufkin, Texas 75901
(713) 634-8806

Counsel for Petitioner

May 24, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-6817

MAURICE McELWEE,

Petitioner.

V.

STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The Petitioner, Maurice McElwee, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of the State of Texas rendered in these proceedings on March 15, 1978 by Panel, and the denial of Petitioner's Motion for Rehearing En Banc on April 5, 1978.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals by Panel of three judges is unreported and appears at Appendix A, infra, pp.11-17 Petitioner's Motion for Rehearing En Banc was overruled without written order or opinion.

JURISDICTION

The order or judgment and opinion of the Court of Criminal Appeals of the State of Texas by a three-judge panel was delivered and rendered on March 15, 1978. See Appendix A, p. 11. The overruling of petitioner's Motion for Rehearing En Banc occurred on April 5, 1978. This petition for certiorari was filed less than 90 days from the aforesaid dates. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the courts of the State of Texas may require that in a state criminal prosecution, jeopardy does not attach until the jury is selected and sworn and the defendant pleads to the indictment, although this Court has held that jeopardy attaches when the jury is selected and sworn, under the 5th Amendment of the U. S. Constitution.

2. Whether under the 5th Amendment to the U. S. Constitution, petitioner was twice placed in jeopardy for the same alleged offense, after a jury had been empanelled and sworn to try Petitioner's case, and then discharged by the trial judge over Petitioner's objection because the district attorney wanted to reindict Petitioner with prior convictions alleged for enhanced punishment, and Petitioner was later tried and convicted of the same charge before a second jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb ..."

Constitution of the United States, Amendment XIV:

> "... nor shall any state deprive any person of life, liberty, or property without due process of law ..."

Article 1, Section 14, Texas State Constitution

"No person, for the same offense, shall be twice put in jeopardy of life or liberty, ..."

STATEMENT OF FACTS

The facts relevant to the questions presented are uncontroverted and therefore may be introduced in summary fashion.

In October 1974, petitioner was indicted by an Angelina County, Texas grand jury for the murder of Joe Kirkwood. The indictment did not allege any prior felony convictions. The case was set for trial on February 4, 1975.

In preparation for the trial, Petitioner subpoenaed eleven witnesses and filed six pre-trial motions. No continuances or postponements had been requested by either side. Petitioner timely filed a written election that the jury assess any punishment in his case.

On February 4, 1975, both sides extensively voir dired the jury panel, and a twelve-member jury was selected and sworn. The jury was told to return on February 7, 1975 to begin the testimony.

On February 7, 1975, the court postponed the trial until February 10, 1975 and told the jury to return on that date. The Court scheduled a hearing on motions for 3:00 p.m. At that time, the district attorney moved that the case be dismissed, because that very day he had found out about some prior felony convictions of Petitioner, and he wanted to reindict Petitioner and allege prior convictions for enhanced punishment. The convictions had at all times been on file and indexed in the District Clerk's office in Angelina County, Texas. Petitioner objected to the dismissal, but the court granted the motion. Petitioner filed a written exception to the court's dismissal, based on double jeopardy and the 5th and 14th amendments.

In March, 1975, petitioner was again indicted for the murder of Joe Kirkwood, with convictions alleged for enhanced punishment. Petitioner filed his sworn plea of former jeopardy, setting out his contention under federal law that jeopardy had attached in the previous case when the jury was selected and sworn, and that no manifest necessity existed for the granting of a mistrial or dismissal of that cause and discharging of the jury. This special plea was overruled by the trial judge.

The case was again called for trial on December 8, 1975. Petitioner went to trial before another jury and was found guilty. Petitioner was sentenced to 99 years in the Texas Department of Corrections, with one prior felony conviction being used for enhancement.

Petitioner appealed his case to the Court of Criminal Appeals of the State of Texas, the highest state criminal appellate court. Petitioner's first ground of error on appeal was that the trial court erred in overruling Petitioner's special plea of former jeopardy in that jeopardy had attached in the prior proceeding, and that no manifest necessity existed for the dismissal of that proceeding.

The case was argued before a three-judge panel of the Court of Criminal Appeals, which held that the Texas rule as to when jeopardy attaches would not be changed in line with federal law, even though the court recognized that federal law was controlling. See opinion, Appendix A., p. 12 , delivered on March 15, 1978.

Petitioner made a Motion for Rehearing En Banc, citing the Bretz v. Crist case, infra, but the motion was overruled without order or opinion.

Petitioner is still confined in the Texas Department of Corrections, Huntsville, Texas, awaiting the outcome of this proceeding.

REASONS FOR GRANTING THE WRIT

This case is virtually identical with the questions presented in the case of Crist v. Cline, which is presently pending before this court. (Appeal accepted by this Court on 3-27-77 in the companion cases styled Bretz v. Crist and Cline v. The State of Montana, CA - 9, 546 F 2d 1336 (1976)). In the present case, the courts of the State of Texas have a different rule on the attachment of jeopardy than does the U. S. Supreme Court. The question remains, does the 5th Amendment to the U. S. Constitution require that jeopardy attaches in all state criminal prosecutions, as well as federal prosecutions, when the jury is selected and sworn, or, in any event, at some time prior to the selection and swearing of the jury, but in no event later than that time?

The Court of Appeals for the Ninth Circuit and the litigants before this Court in the Crist case have probably articulated Petitioner's arguments as well as can be done. Therefore, Petitioner will discuss mainly how the Texas law evolved to be different from the federal law, and the facts and circumstances in this case which allow Petitioner's rights to be prejudiced in contravention of the 5th Amendment.

In the old cases of Anderson v. State, 7 SW40 (Tex.Cr.App. 1886), Yerger v. State, 41SW621 (Tex.Cr.App. 1897), and Steen v. State, 242SW1047 (Tex.Cr. App. 1922), the rule in Texas began to be formed that jeopardy does not attach until the defendant pleads to the indictment. In the very same breath, the court was quoting the legal scholar, Cooley:

> "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a

new prosecution; and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the case."

Cooley's Const. Lim. (15th Ed.) 404.

However, somehow, the Court came up with the new rule that appears to conflict with Cooley on its face. This Texas rule has been followed in Texas as late as Lockridge v. State, 522 S.W. 2'd 526 (Tex.Cr.App. 1975). The decision in Lockridge is poorly reasoned and ignores and misinterprets the federal law which was urged. The court stated that the federal rule that jeopardy attaches when the jury is selected and sworn was dictum in the Serfass case (95 S.Ct. 1055). The Court totally ignored the principles announced in Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 36 L. Ed. 2'd 424 (1973), U.S. v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L. Ed. 543 (1971), and Downum v. U.S., 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2'd 100 which hold clearly that jeopardy attaches when the jury is selected and sworn.

The present opinion of the Court of Criminal Appeals (Appendix A, pp. 11 - 17) is unreported, and yet finally, after many years, the Court has faced the issue of the conflict between the federal and state law. The Court recognizes that the double jeopardy clause of the 5th Amendment is applicable to the States through the 14th Amendment. (Appendix A, p. 11), citing Duckett v. State, 454 S.W. 2'd 755 (Tex.Cr.App. 1970) and Taylor v. State, 474 S.W. 2'd 207 (Tex.Cr.App. 1972). The court then recognizes the federal attachment of jeopardy rule, citing Illinois, Jorn, and Downum. And yet, the court again refuses to overturn the Texas rule, finding "no compelling reason" to do so. The compelling reason should be the supremacy of this Court and its decisions in this field which have been so often ignored by the State of Texas.

The federal rule for the attachment of jeopardy should apply to the States uniformly, because the rights under the Double Jeopardy Clause are protected as a "fundamental ideal in our constitutional heritage." Benton v. Maryland, 395 U.S.

784, 89 S.Ct. 2056, 23 L.Ed. 2d 707. The stage at which jeopardy attaches is not one merely seized by this Court as a matter of procedure or convenience, but as an important and critical time when a defendant's life and liberty is placed in the hands of twelve people who are charged to hear his case.

The idea underlying the constitutional prohibition against double jeopardy is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. U.S., 78 S.Ct. 221, 355 U. S. 184, 2 L.Ed. 2d 199, 61 ALR 2d 1119. Please consider the effect upon a defendant, as in Petitioner's case, where the district attorney is allowed to wait until the jury is selected and sworn and the defendant has prepared extensively for trial, including eleven subpoenas issued, six motions filed, and voir dire of the jury, and then the district attorney moves for a dismissal for no other reason than to improve his position brought about by his own neglect. The Petitioner's prior convictions were on file and indexed in the District Clerk's office in Angelina County, Texas, only a few feet away from the district attorney's office, not to mention the state records available to the prosecutor. The prosecutor had over four months, from September, 1974 until February, 1975, to have the indictment read as he wished and to prepare his case. This is the same type of sloppy prosecutorial preparation condemned in Downum, McNeal v. Hollowell, 481 F 2d 1145, cert.den. 94 S.Ct. 1476 (1973), and in U.S. v. Glover, 506 F 2d 291 (1974), wherein the court said that the means for the prosecution to protect its legitimate interest was at hand, and that the decision should alert prosecutors to enlist the willing aid of the trial courts fully before the jury comes into the box.

Considering the serious consequences of the prosecutor's manipulation of the court system, as shown in Petitioner's case, this court cannot afford to hold that the State of Texas or any other state may provide for a different and later stage at which jeopardy attaches. The federal rule is a "product of constitutional exegesis" and the "lynchpin for all double jeopardy jurisprudence." Bretz v. Crist, supra. This Court in Illinois v. Somerville recognized that federal standards control in a state prosecution, as in Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed 2d 346 (1975). Petitioner urges this court to follow the sound reasoning of the Bretz v. Crist court, in the spirit of the Constitution of the United States, and with strong consideration given to the "valued right of the accused to have his trial completed by a particular tribunal which he believes may be favorably disposed to his fate." Jorn, supra.

As to whether manifest necessity existed for the discharge of Petitioner's first jury so as to allow retrial, the facts are clear. The sole reason for the prosecutor's motion was to allow the state to reindict petitioner and allege prior felony convictions, for the sole purpose of enhancing the punishment. Petitioner objected to the discharge. The judge made a decision without taking the time to seriously consider the countervailing interests of Petitioner. See Smith v. Mississippi, 478 F 2d 88 cert. den. 94 S.Ct. 844 (1973). The mistrial was granted for the benefit of the prosecutor and not petitioner, and petitioner did nothing to bring it about. See U.S. v. Glover, 506 F 2d 291 (1974). The district attorney was guilty of sloppy prosecutorial preparation. See McNeal v. Hollowell, 481 F 2d 1145, cert. den. 94 S.Ct. 1476 (1973), and Downum v. U.S., supra. The state was allowed to strenthen its case against Petitioner. See U. S. v. Kin Ping Cheung, 485 F 2d 689 (1973). The trial court did not consider the alternative, that the district attorney would still be allowed under Texas law to present the

prior convictions of petitioner to the jury at the punishment stage of the trial and ask for a higher punishment on that basis. See U.S. v. Jorn, supra. The dismissal was one which lent itself to prosecutorial manipulation. See Illinois v. Somerville, supra, and Downum v. U.S., supra. There was no important countervailing interest of proper judicial administration. See Russo v. Superior Court of New Jersey, 483 F 2d 7, cert. den., 94 S.Ct. 447, 414 U.S. 1023, 38 L. Ed 2d 315. The trial court could not have granted a mistrial without the State's motion for the reason given.

The fact that no manifest necessity was present for the aborting of the trial by the judge is clear. However, if there be any doubt, under Downum, it must be resolved in favor of the liberty of the citizen.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

Steven M. Mason

Wilson McVicker, Jr.

McVicker, Evans and Mason
113 N. Second Street
P. O. Drawer 1747
Lufkin, Texas 75901
(713) 634-8806

Counsel for Petitioner

May 19 , 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-~~617~~ 6817

MAURICE McELWEE,

Petitioner.

V.

STATE OF TEXAS

FIRST SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Steven M. Mason

Wilson McVicker, Jr.

McVICKER, EVANS & MASON
113 N. Second Street
P. O. Drawer 1747
Lufkin, Texas 75901
(713) 634-8806

Counsel for Petitioner

June 27, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-6817

MAURICE McELWEE,

Petitioner.

V.

STATE OF TEXAS

FIRST SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The petition for writ of certiorari on behalf of Maurice McElwee was filed in this court on May 28 ,1978. The petition concerns major questions involving the Double Jeopardy guarantees of the 5th and 14th Amendments. The case of Crist, et al v. Bretz, et al, No. 76-1200, then pending and undecided in this Court, was quoted in our petition as being directly on point to the iss es raised in the present case. (See Petition, p. 5). This Court has now decided this case on June 14, 1978, and the holdings of this Court are wholly applicable to and in favor of Petitioner's contentions in the present case. This court held (opinion p. 10,11) that the

federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the consitutional guarantee against double jeopardy. Thus, in the present case (see opinion of Court of Criminal Appeals, p. 11 of Petition), when the trial court dismissed the initial prosecution, after the jury had been selected and sworn, for the sole reason to allow the prosecutor to reindict Petitioner and allege prior convictions for enhanced punishment, jeopardy attached so as to forever bar retrial of Petitioner.

Therefore, due to these uncontroverted facts which fall squarely within the ruling in the Crist case, the present case is one which should now be summarily reversed by this court.

WHEREFORE, Petitioner now prays that this court grant certiorari and summarily reverse the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

Steven M. Mason

Wilson McVicker, Jr.

McVICKER, EVANS & MASON
113 N. Second Street
P. O. Drawer 1747
Lufkin, Texas 75901
(713) 634-8806

Counsel for Petitioner

PROOF OF SERVICE

THE STATE OF TEXAS, §

COUNTY OF ANGELINA. §

I, Steven M. Mason, as attorney for Maurice McElwee, Petitioner, delivered in person a true copy of the foregoing Supplemental Petition for Writ of Certiorari to the office of Gerald Goodwin, District Attorney for Angelina County, State of Texas as attorney of record representing

the State, on this the 27th day of June, 1978.

Steven M. Mason

Steven M. Mason

SUBSCRIBED and SWORN to before me, the undersigned authority, by the said Steven M. Mason, on this the 27th day of June, 1978.

Karen Lee

Karen Lee
Notary Public in and for Angelina County, Texas. My commission expires Dec. 8, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1978

* * *

NO. 77-6817

* * *

MAURICE McELWEEE,
Petitioner

V.

~~W. J. ESTELLE, JR., DIRECTOR,~~ TEXAS
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

BARBARA M. BARRON
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1978

* * *

NO. 77-6817

* * *

MAURICE McELWEEE,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

* * *

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

In a per curiam opinion delivered March 14, 1978, the Texas Court of Criminal Appeals affirmed Petitioner's conviction. That Court rejected, inter alia, Petitioner's contention that his conviction was obtained in violation of the Fifth Amendment double jeopardy clause. In its opinion, delivered three months prior to this Court's ruling in Crist v. Bretz, ____ U.S. ____, 98 S.Ct. 2156 (1978), the Texas Court acknowledged the difference between the federal rule regarding the attachment of jeopardy and the longstanding Texas rule which provides that jeopardy does not attach until the jury is selected and sworn and the defendant pleads to the indictment but affirmed the application of the Texas rule in the context of Petitioner's claim of federal constitutional deprivation.

JURISDICTION

Petitioner has properly invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Respondent belives that only one question is presented for review by this Court and that it should be stated as follows:

Did jeopardy attach under Petitioner's first indictment through the retroactive application of this Court's recent ruling in Crist v. Bretz, supra?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Fifth and Fourteenth Amendments to the United States Constitution in presenting his claims.

STATEMENT OF THE CASE

In October of 1974, Petitioner was indicted for murder in state court. This indictment did not allege any prior felony convictions for enhancement. The case was called for trial on February 4, 1975, and the jury was impaneled and sworn. Because the Court was then engaged in another trial, the jury was admonished and told to return on February 7, 1975. The indictment was not read to the jury and Petitioner did not enter his plea. On February 7, 1975, the Court was still engaged in another trial and the jury was told to return on February 10, 1975. On February 7, 1975, in a hearing before the Court without the jury the State announced that it had discovered that Petitioner had prior felony convictions, and submitted a motion that the indictment be dismissed so that Petitioner could be reindicted with the prior felony convictions alleged for enhancement. The motion to dismiss the indictment was granted over Petitioner's objection. Petitioner was subsequently reindicted in March, 1975, with two prior felony convictions alleged for enhancement. Petitioner raised his former jeopardy claim prior to the beginning of his trial on the new indictment. The trial court overruled Petitioner's claim of former jeopardy.

ARGUMENT AND AUTHORITIES

Jeopardy Did Not Attach Under Petitioner's First Indictment Because This Court's Recent Ruling in Crist v. Bretz, U.S. , 98 S.Ct. 2156 (1978) Is Not Retroactive.

The facts in this case are undisputed. Petitioner's first indictment was dismissed over Petitioner's objection

after the jury had been impaneled and sworn, but before the indictment was read to the jury and before Petitioner entered his plea. Petitioner was then reindicted and two prior felony convictions were alleged for enhancement purposes.

Under the Texas rule at that time, jeopardy did not attach until the defendant plead to the indictment. Lockridge v. State, 522 S.W.2d 526 (Tex.Crim.App. 1975); Vardas v. State, 518 S.W.2d 826 (Tex.Crim.App. 1975), cert. denied, 423 U.S. 904, 96 S.Ct. 206 (1975); Ochoa v. State, 492 S.W.2d 276 (Tex.Crim.App. 1973); Ramirez v. State, 352 S.W.2d 131 (Tex.Crim.App. 1961); Steen v. State, 242 S.W.2d 1047 (Tex.Crim.App. 1922); Yerger v. State, 41 S.W.2d 621 (Tex.Crim.App. 1897); Anderson v. State, 7 S.W.2d 40 (Tex.Crim.App. 1886). Because the first indictment was dismissed before it was read to the jury and before Petitioner entered his plea, jeopardy had not attachedunder the Texas rule.

This Court's recent ruling in Crist v. Bretz, ___ U.S. ___, 98 S.Ct. 2156 (1978), established that:

> ...the federal rule that jeopardy attaches when a jury is impaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.

Id. at 2162. Accordingly, this Court held that the federal rule setting the point at which jeopardy attaches is binding on the state.

Respondent submits that the question of whether jeopardy attached to Petitioner's first indictment is wholly dependent on whether this Court's ruling in Crist v. Bretz, supra, is to be given retroactive effect.

The Court set forth the criteira for determining the retroactive effect of ruling involving the double jeopardy provision of the Constitution in Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876 (1973). Although the criteria which had been put forward in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965), were characterized as "not appropriate" in the context of double jeopardy claims, this Court continued to emphasize the "...element of reliance embodied in the Linkletter analysis..." Robinson v. Neil, supra, at 409 U.S. 509, 93 S.Ct. 878.

The State of Texas has relied on the constitutional validity of its own rule setting the time at which jeopardy attaches. Not until its ruling in Crist v. Bretz did this Court explicitly rule that the federal rule regarding the attachment of jeopardy was an integral part of the constitutional guarantee against double jeopardy. The State has relied on the constitutionality of its jeopardy attachment rule. Its continuing reliance is exemplified by a recent case, Vardas v. State, supra. In that case, a defendant was indicted on two counts -- robbery by assault and robbery by firearms. (Both counts related to the same transaction.) The Court limited the state to trial on the second count of the indictment. The defendant did not plead to the first count, and the first count of the indictment was not read to the jury. The first trial resulted in a conviction based on the second count, robbery by firearms, which was later reversed by the Texas Court of Criminal Appeals. The defendant was then retried, over his double jeopardy objection, on the first count of the indictment, and was convicted. The Texas Court of Criminal Appeals relying on its ruling on Ochoa v. State, supra, held that jeopardy does not attach until the defendant pleads to the indictment. This Court denied certiorari to the Texas Court of Criminal Appeals in the Vardas case.

The Vardas case illustrates that the stance of this Court on the constitutional validity of variant state rules on the point of jeopardy attachment was not clear to the state prior to the Crist v. Bretz ruling. The mere fact that the federal rule as to when jeopardy attaches has long been established does not, without more, establish that the federal rule is constitutionally mandated and therefore binding on the states. Certainly, reasonable persons have differed as to whether the general rules concerning attachment of jeopardy, previously announced by this Court in cases such as Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055 (1975), were of constitutional dimension. Accordingly, retroactive application of the Crist v. Bretz ruling would result

in the unfair overturning of convictions obtained by the state in good faith reliance of its own jeopardy attachment rule. In this case, had the State had reason to doubt the constitutional validity of its rule, it could have simply proceeded to try Petitioner on the original indictment without the enhancement counts. That the State chose instead to dismiss the original indictment and reindict Petitioner to bring in the enhancement counts clearly reflects the State's reliance on the constitutional validity of its rule.

The State's reliance on the constitutionality of its rule is well founded, notwithstanding suggestive language in earlier decisions by this Court that the federal rule may be constitutionally mandated. Where there is a wide variance between the point at which jeopardy attaches under the state rule and the federal rule, if the federal rule is constitutionally mandated, then clearly the federal rule must surplant the state rule. For example, a state rule which provided that jeopardy did not attach until the defense began to present evidence would clearly fail to adequately safeguard constitutional rights against double jeopardy. The federal rule providing for attachment of jeopardy in the earliest stages of trial would clearly be preferable on constitutional grounds to such a state rule. Prior to this Court's ruling in Crist v. Bretz, supra, however, the State could reasonably believe that further fine tuning of its rule as to the attachment of jeopardy was not constitutionally required. It is important to note that the temporal difference between the attachment of jeopardy under the federal rule and under the Texas rule would typically be on the order of one or two minutes. Immediately after the jury is impaneled and sworn the accused is arraigned -- the indictment is read and the accused enters his plea. Thus, where the state and federal rules provide for attachment of jeopardy at such close points in the trial, the State's belief in the constitutional validity of its rule is imminently reasonable.

CONCLUSION

Retroactive application of the ruling in Crist v. Bretz,

supra, would only result in the overturning of convictions obtained in good faith reliance on the constitutional validity of the Texas rule. Respondent contends that the lengthy history of the Texas rule and the reasonableness of the State's reliance on the validity of its rule, militate strongly against the retroactive application of this Court's ruling in Crist v. Bretz, supra. Therefore, Respondent asserts that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

Barbara M Barron
BARBARA M. BARRON
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281